to recover the original contract price for the coal. *Mancourt-Winters Coal Co. v. Ohio & Michigan Coal Co.* (Mich., 1922), 187 N. W. 408.

Judging from the facts stated in the report, it seems highly probable that the parties never intended to make a new contract at all. Rather, it appears that they felt themselves legally bound to add the 45 cents to their contract price. But assuming that there was an intent to form a new contract, in principle it seems very dubious whether we can spell out a contract from the second agreement. We believe that there was no new consideration moving to D which can support the alleged illegal contract. The seller was already legally bound to deliver the coal. In *King v. Duluth, M. & N. Ry. Co.*, 61 Minn. 482, the court observed: "where the promise is simply a repetition of a subsisting legal promise, there can be no consideration for the promise of the other party, and there is no warrant for inferring that the parties have voluntarily rescinded their contract. * * * The promise cannot be legally enforced, although the other party has completed his contract in reliance upon it." WILLISTON, CONTRACTS, § 130; 34 L. R. A. 33 (note); 6 R. C. L. 918. However, Michigan, along with a minority of the courts, has held such second contracts to be valid. *Moore and others v. Detroit Locomotive Works*, 14 Mich. 266 (delivery of locomotive); *Goebel v. Linn*, 47 Mich. 489 (delivery of ice); *Conkling v. Tuttle*, 52 Mich. 630 (new lease after notice to quit); *Blodgett v. Foster*, 120 Mich. 392 (delivery of lumber); *Scanlon v. Northwood*, 147 Mich. 139 (building contract). See also cases cited in WILLISTON, *supra*. The theory of the court, as laid down by Judge Cooley in the earliest case above cited, was that there was a releasing of the liability for failure to perform the first contract and a substitution of an entirely new contract.

There would seem to be an inconsistency between the second and third points made by the court in the principal case. That the court should deny D a set-off because the parties were "in *pari delicto*" and allow P to recover on the original contract seems illogical and we believe unjustified by the authorities relied upon by the court. The Michigan cases cited in support of this position deny recovery to either party. See, in particular, *Walhier v. Weber*, 142 Mich. 322, 325. 9 CYC. 564, also relied upon by the court, is to the effect that an "illegal agreement will not affect a prior lawful one between the same parties." But in none of the cases cited for this statement was there a rescission or release from the original obligation, an essential incident to the theory of the Michigan court as above stated. It is submitted, therefore, that though the Michigan court was bound, as a matter of *stare decisis*, to arrive at the conclusion it did as to there being a second contract, there is no justification for the difference made between D's right to a set-off and P's right to recover.

CONTRACTS—REPUDIATION—DUTY OF BUYER TO MITIGATE DAMAGES.—The plaintiff agreed to sell and the defendant to buy a carload of flour to be delivered at a subsequent date. Before the time for delivery had arrived the defendant gave notice of his repudiation of the contract. The plaintiff proceeded with the contract, however, and at the time of delivery shipped

the flour to the defendant. Being unable to dispose of it there, he reshipped the flour to New York at considerable expense. The plaintiff could have disposed of the flour at the point of shipment. *Held,* that the seller could treat the notice of repudiation by the buyer as inoperative and continue performance, holding the buyer responsible for all loss resulting. *Barber Milling Co. v. Leichthammer* (Pa., 1922), 116 Atl. 677.

Upon principle, the plaintiff should have been allowed to recover only the difference between the sale price and the contract price at the time of performance, this being the usual measure of damages in such cases. *Rhodes v. Cleveland R. M. Co.,* 17 Fed. 426. Some few cases require the injured party to make a forward contract. *Roth v. Taysen,* 73 L. T. 628 (but see *Roper v. Johnson,* L. R. 8 C. P. 167); *Roehm v. Horst,* 178 U. S. 1 (*semble*). The authorities in this country are *contra. Kadish v. Young,* 108 Ill. 170; *Leigh v. Paterson,* 8 Taunt. 540; *Brown v. Muller,* L. R. 7 Ex. 319. Where the results of such a contract are uncertain, as in the case of a rising or falling market, it seems clear that the plaintiff should not be forced to assume the burden of making a forward contract and thus put himself at the mercy of a jury. See *Missouri Furnace Co. v. Cochran,* 8 Fed. 463. In allowing the plaintiff to recover for all of the shipping expenses the court is in line with those English decisions which follow the *dictum* of Cockburn, C. J., in *Frost v. Knight,* L. R. 7 Ex. 111, and has some decisions in its support in the United States. *Roebling's Sons Co. v. Lock Stitch Fence Co.,* 130 Ill. 660, 22 N. E. 518. In applying this doctrine the foregoing cases seem to have lost sight of the rule that "the party injured must mitigate the damages as much as he can without injury to himself." *Clark v. Marsiglia,* 1 Denio (N. Y.) 317, 43 Am. Dec. 670. The weight of authority supports the latter doctrine, although it does not require the innocent party to take a chance of injury to self by making a forward contract. *Ward v. American Health Food Co.,* 119 Wis. 12; *Hosmer v. Wilson,* 7 Mich. 293; *Cumberland Mfg. Co. v. Wheaton,* 208 Mass. 425; *Johnson v. Meeker,* 96 N. Y. 93. The prevailing rule of damages allows compensation to the injured party only for the loss necessarily caused by the defendant's breach. *Kingman v. Western Mfg. Co.,* 92 Fed. 486. But in the principal case all the damages were not necessarily caused by the defendant's breach, inasmuch as the plaintiff could have sold the flour at shipping point at time of delivery and avoided the shipping costs.

CONTRACTS—RESTRAINT OF TRADE—TERRITORIAL LIMITATION.—Defendant sold his grocery business in Porterdale, Ga., to the plaintiffs. One of the terms of the contract of sale was that "the said first party is not to go into business in competition with the said second parties." The Civil Code of Georgia, 1910, § 4253, makes a contract in general restraint of trade unenforceable. In a suit to enjoin the defendant from engaging in the grocery business in Porterdale, *held,* the contract was unenforceable as one in general restraint of trade. *Bonner v. Bailey* (Ga., 1922), 110 S. E. 875.

With the relaxation of the rigor of the ancient common law rule, that all contracts in restraint of trade were void, there became established the